

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32099

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 671
	)	
Plaintiff-Respondent,	)	Filed: October 3, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
DIANA L. FLEDDERJOHANN,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas F. Neville, District Judge.

Judgment of conviction for injury to a child, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

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WALTERS, Judge Pro Tem

Diana L. Fledderjohann entered a conditional plea of guilty to a charge of injury to a child, I.C. § 18-1501(1). She appeals, contending that the district court erred in denying a portion of her motion to suppress evidence. We affirm.

I.

BACKGROUND

The following facts appear from the oral findings and the written decision of the district court entered at the conclusion of the hearing on Fledderjohann's motion to suppress. Fledderjohann's parents and her brother, Scott, co-owned a house on Waterbury Way in Meridian. They had purchased the house so Fledderjohann and Scott would have a place to live when they left their parents' home. Scott and Fledderjohann lived in the house until March or April 2004, when Scott moved out to get married. After that Fledderjohann lived in the house with her ten-year-old daughter, KF, and with a roommate who paid half of the rent to her, and

which Fledderjohann would then pay to her mother. As an arrangement among the family members, Fledderjohann's parents and brother had keys to her house and she had keys to their houses so they could enter each other's homes at any time. There was also a keypad locking system on Fledderjohann's house and her mother had the code numbers so she could get into the house at any time without a key.

The family had a birthday party for Scott on July 24, 2004. After the party Fledderjohann took KF home, dropped her off at the house and told KF she would be back in a few minutes. Six days later, Fledderjohann's mother stopped at the house on her way home from work because she had learned that Fledderjohann had lost her job at Blue Cross where both of them worked. The door was unlocked; Mrs. Fledderjohann entered and found that no one was in the house, although the television was on. While she was in the house, KF came in with some friends. KF told her grandmother that she had not seen her mother in the past week and that she had been left alone at the house without adult supervision. Mrs. Fledderjohann observed that the kitchen and living areas of the home were filthy; there were dirty dishes, an empty beer container in the living room, dried food, unwashed moldy dishes, and no food or milk in the house. Mrs. Fledderjohann took KF home with her. She talked the situation over with her husband when he came home from work around ten o'clock p.m., and with Scott and his wife. Sometime that evening, Mrs. Fledderjohann tried to telephone Fledderjohann at the latter's cell phone number but got no answer and left a message on the cell phone. She never heard back from Fledderjohann. She decided to call the police and agreed to meet the police at Fledderjohann's house later that night.

When the police arrived at Fledderjohann's house, they asked for and received permission from Mrs. Fledderjohann and Scott to enter the house in order to determine if KF had been abandoned or was living in dangerous surroundings, and to investigate Fledderjohann's disappearance. The police did not have a warrant to search the premises. Scott used his key to let the officers into the house. Inside, the officers observed the general condition of the house and discovered drug paraphernalia in plain view, consisting of two glass pipes lying on furniture and a torch lying on the bedroom floor, that is commonly used to heat pipes to ingest or smoke methamphetamine. The officers also conducted a more thorough search and found additional drug-related items in a closed liquor-bottle bag in an open closet in the master bedroom.

Fledderjohann was charged with injury to a child and with possession of drug paraphernalia. She moved to suppress the officers' observations of the condition of the home, photographs taken by the officers of the interior of the home, and the drug paraphernalia found by the officers in plain view and in the closed bag. The district court granted the motion as to the paraphernalia found in the closed bag, but denied the motion as to the officers' observations, the photographs, and the two glass pipes.<sup>1</sup> The district court held that it was reasonable on three grounds for the officers to enter Fledderjohann's home without a warrant. First, the court held that because the officers were authorized by statute<sup>2</sup> to take the child, KF, into custody by the Idaho Department of Health and Welfare if the child's welfare was in danger or if she was abandoned, the officers' investigation permitted them to enter the house to view the conditions under which the child was living and to determine whether she had been abandoned and should be taken into custody. Additionally, the court held that the officers had consent from the owners of the property, Fledderjohann's mother and brother, to enter the premises. Finally, the court held that the officers were acting under a community caretaking function when they entered the house to determine the whereabouts of Fledderjohann, who according to her parents, was a missing person who had not been seen or heard from for a week. The court held, however, that once the officers were in the house engaging in their observations of conditions and of items in plain view, it was unreasonable for the officers to conduct a more intrusive search by looking into the small closed bag from the closet, where they found drug paraphernalia in addition to the items in plain view. Consequently, the court ordered suppression of the items in the bag.

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<sup>1</sup> The order denying suppression of evidence does not specify whether the torch found in plain view on the bedroom floor would be suppressed or not.

<sup>2</sup> The district court cited I.C. § 16-1612(a)(1) as authority for the officers to investigate the premises and effect an emergency removal of the child. The statute has since been recodified as I.C. § 16-1608 and provides:

(1) (a) A child may be taken into shelter care by a peace officer without an order issued pursuant to subsection (4) of section 16-1611 or section 16-1619, Idaho Code, only where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child or where the child is an abandoned child pursuant to the provisions of chapter 82, title 39, Idaho Code.

Fledderjohann then agreed to plead guilty to the charge of injury to a child in exchange for dismissal of the drug possession charge, reserving the right to appeal the denial of her suppression motion. After entry of a judgment of conviction and sentence, Fledderjohann brought this appeal. She contends that the district court erred in denying in part her motion to suppress evidence. In this respect, Fledderjohann challenges the district court's determination that the officers did not violate her Fourth Amendment rights<sup>3</sup> when they entered her home without a warrant.

## II.

### STANDARD OF REVIEW

The review of an order on a motion to suppress evidence involves mixed questions of law and fact. *State v. Zubizareta*, 122 Idaho 823, 826, 839 P.2d 1237, 1240 (Ct.App.1992); *State v. McAfee*, 116 Idaho 1007, 1008, 783 P.2d 874, 875 (Ct.App.1989). On appeal, we defer to the findings of the district court unless they are clearly erroneous, *State v. DuVal*, 131 Idaho 550, 552-53, 961 P.2d 641, 643-44 (1998); *State v. Stevens*, 126 Idaho 822, 823, 892 P.2d 889, 890 (1995); *Zubizareta*, 122 Idaho at 826, 839 P.2d at 1240, but we exercise free review in deciding whether, on those facts, constitutional requirements have been satisfied. *Zubizareta*, 122 Idaho at 826, 839 P.2d at 1240. The credibility of witnesses and weight to be given the facts in evidence is in the trial court's province. *State v. Brauch*, 133 Idaho 215, 218, 984 P.2d 703, 706, (1999).

## III.

### DISCUSSION

An officer's warrantless entry into a residence to conduct a search is presumptively unreasonable and prohibited by the Fourth Amendment. *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *State v. Curl*, 125 Idaho 224, 225, 869 P.2d 224, 225 (1993). However, an officer need not obtain a warrant if the search falls into one of the recognized exceptions to the warrant requirement. *State v. Reimer*, 127 Idaho 214, 899 P.2d 427 (1995). Here the district court

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<sup>3</sup> Fledderjohann also argues that the conduct of the police violated her rights under Art. I, § 17 of the Idaho Constitution, which is generally coextensive with the Fourth Amendment to the Constitution of the United States. See, e.g., *State v. Holton*, 132 Idaho 501, 975 P.2d 789 (1999).

upheld the officers' search of Fledderjohann's house and seizure of evidence under a recognized exception to the requirement of a warrant, consent, and upon two other grounds: the statutory authority to investigate whether KF was an abandoned child or was in imminent danger, and the community caretaking function of trying to determine Fledderjohann's whereabouts and condition.

At the outset, having reviewed the record, we hold that the district court's findings of fact are supported by substantial, competent evidence and therefore are not clearly erroneous. They will be sustained. *DuValt*, 131 Idaho at 552-53, 961 P.2d at 643-44; *Stevens*, 126 Idaho at 823, 892 P.2d at 890. Consequently, we must decide whether the district court's conclusion that the State did not violate Fledderjohann's Fourth Amendment rights can be sustained.

The State argues, and we agree, that the officers' entry into Fledderjohann's house can be upheld upon the consent exception to the warrant requirement. A warrant is not required when the police obtain consent for the search from a person who has authority to consent. *Brauch*, 133 Idaho at 219, 984 P.2d at 707 (citing *United States v. Matlock*, 416 U.S. 164 (1974)). Proper consent may come from any person who possesses common authority over the premises, which is derived from mutual use with joint access or control for most purposes. *State v. Barker*, 136 Idaho 728, 40 P.3d 86 (2002). If the person granting the police authority to search does not have actual authority, the search may still be legitimate if the officer reasonably believes that the person has authority to consent to the search. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). This concept is known as apparent authority and its application depends upon whether the police officer's belief that the person granting consent has authority, is objectively reasonable. *Brauch*, 133 Idaho at 219, 984 P.2d at 707. *See also*, *State v. McCaughey*, 127 Idaho 669, 674, 904 P.2d 939, 944 (1995); *State v. Hawkins*, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). The officers' conduct is "judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises?" *Rodriguez*, 497 U.S. at 188.

Here, Fledderjohann's mother testified at the suppression hearing. She said she and her son Scott owned the house and that the family members had keys to each others' homes so they could get into each others' houses even when they were not home. She testified that they met the officers at the house and gave them permission to enter the home to conduct the investigation. One of the officers also testified at the suppression hearing. He said that he met Fledderjohann's

mother, father, brother, Scott, and Scott's wife at the house on Waterbury. He said the purpose of the investigation was to confirm the conditions under which KF was living that had been described by the family. He related that if it was determined that KF was abandoned or living in unsafe conditions that created imminent danger to KF, he would report the situation to the Department of Health and Welfare and place her in the Department's care. He was also concerned for the welfare of Fledderjohann who had not been seen or heard from for a week. He asked for and obtained permission from Fledderjohann's mother and brother, Scott, owners of the house, to enter the home. He testified that before the entry he asked them if they had authority to allow the officers to enter the home, which they said they did, and that Scott opened the door with his key to let them in.

This case involves a family relationship different from an ordinary landlord-tenant arrangement, because each had keys to the others' homes and each could enter the others' homes at any time.<sup>4</sup> The locks were not changed when Fledderjohann took possession of the house or after Scott left the residence to get married. Fledderjohann's mother even had the code to the keypad on one door so she could enter at any time without a key. The parties had joint control over the premises, and access to the interior of the house by the owners was not restricted by Fledderjohann whether or not she was present on the property. Fledderjohann's mother, an owner of the property, was acting under normal, natural instincts for the welfare of her daughter and granddaughter when she visited the house and found her ten-year-old granddaughter alone, as she had been for the past week, in filthy conditions and without food. The family's attempts to reach Fledderjohann by cell phone after KF was discovered alone in the home were unavailing. Given the condition of the home as it was observed by Fledderjohann's mother, it was reasonable for the family to request assistance from the police. The police asked permission from people who appeared to have full authority to grant the request as owners who had access and control over the premises. It was objectively reasonable for the police to act on that

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<sup>4</sup> Compare, *State v. Johnson*, 110 Idaho 516, 716 P.2d 1288 (1986) (motel landlord who had no apparent authority to enter motel room let police into room to see marijuana plants landlord had found); *State v. Ham*, 113 Idaho 405, 744 P.2d 133 (Ct. App. 1987) (rented room in home unlocked when defendant was not present in the room and mother-landlord had access to the room because of shared common control); *State v. Benson*, 133 Idaho 152, 983 P.2d 225 (Ct. App. 1999) (garage rented as living quarters with padlock on door that prevented mother-landlord from entry and defendant was present and objected when mother let police into the garage, demonstrating lack of apparent authority).

permission to determine the conditions under which KF was living alone without food in the house in filthy conditions and out of concern for the well being of Fledderjohann who had been reported as a missing person.

#### **IV.**

#### **CONCLUSION**

The entry of the police into Fledderjohann's house occurred with the consent of her parents and brother, the owners of the house, who had unfettered access in common with Fledderjohann to the interior of the house. Under the totality of the circumstances, it was objectively reasonable for the officers to believe that the owners had apparent authority to consent to the officers' entry into the home for the purpose of observing its condition and to attempt to determine Fledderjohann's whereabouts.

The order of the district court denying Fledderjohann's motion to suppress the observations of the police, the photographs taken by the police, and the glass pipes found in plain view is affirmed. Because we uphold the search on the basis of apparent authority to consent to the search, it is unnecessary to decide whether the district court correctly determined that the search was lawful on other grounds.

**Judge PERRY CONCURS**

**Judge LANSING, CONCURRING IN THE RESULT**

I concur in affirmation of the district court's order denying Fledderjohann's suppression motion, but not merely because Fledderjohann's family members had keys to her residence. Fledderjohann was a tenant who rented the home and therefore plainly had a reasonable expectation of privacy there. The mere fact that family members who owned the house possessed keys, and therefore could enter without her permission, does not change that conclusion. Landlords would nearly always be expected to retain keys to rented premises, for otherwise they could not gain entry in the event of abandonment by the tenant or in order to evict a tenant. And people often share keys to their residence with family members or trusted neighbors as a matter of convenience, but they do not thereby confer power on the keyholder to consent to police searches of their home.

I conclude that Fledderjohann's mother and brother had authority to consent to the police entry of the home in this circumstance only because it appeared that Fledderjohann had abandoned the premises. Normally, one week's absence from a rented property would not

constitute abandonment, but here the tenant, Fledderjohann, had left her ten-year-old child unattended in the home for a week, and had not appeared at her place of employment over the same period, which indicated that this was not an ordinary temporary absence. In this unique circumstance, I conclude that Fledderjohann's mother and brother had apparent authority as landlords to authorize entry of the premises. On that basis, I join in affirming the district court's order denying Fledderjohann's suppression motion.